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No. 03-596

IN THE

Supreme Court of the United States

Brian Goodine,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

REPLY BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Under 21 U.S.C. 841, is drug quantity an element of the offense or instead a sentencing factor?

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REPLY BRIEF FOR THE PETITIONER

The petition for certiorari demonstrated that this case presents the important and recurring circuit conflict over whether, under 21 U.S.C. 841, drug quantity is an element of the offense (which is the D.C. Circuit's rule) or instead a sentencing factor (which is the rule adopted by the First Circuit in this case). The government's passing attempt to deny a conflict with *United States* v. *Graham*, 317 F.3d 262 (CADC 2003), is not a serious argument. Not only does the government acknowledge *Graham*'s holding, but this case and *Graham* are also indistinguishable on their facts. The government's further suggestion that the question presented rarely arises because the government charges drug quantity in those cases that implicate the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), is *entirely* misleading, for it omits that most Section 841 cases do *not* implicate *Apprendi*. The decision below is moreover incorrect on the merits for the reasons set forth in the petition and the excellent brief of *amici curiae* the National Association of Criminal Defense Lawyers, Families Against Mandatory Minimums, and the National Association of Federal Defenders. Certiorari accordingly should be granted.[1]

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[1] Petitioner unsuccessfully argued below that his sentence violated *Apprendi* because it exceeded the otherwise applicable Guideline range. See Pet. App. 13a-14a. No court of appeals had accepted that argument, and it was therefore not raised by the petition for certiorari. After the petition was filed, however, the Solicitor General filed a brief in No. 02-1623, *Blakely* v. *Washington*, *cert. granted*, 124 S. Ct. 429 (2003) – which presents the question whether a sentence that exceeds a *statutory* sentencing guideline triggers *Apprendi* – explaining that a holding by this Court in favor of the defendant in *Blakely* could be equally applicable to the federal Guidelines. See Br. for the U.S., *Blakely*, at 1. Because that question is presented by the judgment in this case and was properly preserved below, the Court may deem it appropriate to hold this petition pending the disposition of *Blakely*.

I. The Circuits Are Split Over Whether Section 841(b) Defines Drug Quantity As An Element Of The Offense Or Instead As A Sentencing Factor.

The First Circuit's decision in this case conflicts squarely with D.C. Circuit precedent. In *United States* v. *Graham*, 317 F.3d 262 (2003), the D.C. Circuit – applying a line of that court's prior decisions – held that Section 841 is a "tripartite" statute, such that drug quantity "is an element of the offense" that must be presented and proved to the jury. *Id.* at 274-75.

1. The government states that "[t]here is no clear circuit conflict." BIO 6. That contention is inexplicable, if only because the Solicitor General acknowledges *Graham*'s holding both in the Opposition in this case and also in another brief in this Court. In this case, the government admits: "In [*Graham*], the court of appeals held that the district court could not sentence the defendant under Section 841(b)(1)(A) in the absence of a jury finding that his drug conspiracy offense involved the requisite threshold quantity of cocaine base." BIO 15-16. In another case, the government acknowledges *Graham*'s holding that "a defendant found guilty of a crime involving an unspecified quantity of drugs is deemed to have been found guilty of violating 21 U.S.C. 841(b)(1)(C), and *Sections 841(b)(1)(A) and (b)(1)(B) may not be relied upon in any way in imposing sentence on that verdict, including to impose a mandatory minimum sentence*." BIO, No. 03-6724, *Santana* v. *United States*, at 19-20 (citation omitted) (emphasis added).

The government's attempt to disclaim the conflict despite these frank acknowledgements lacks merit. The D.C. Circuit would reverse petitioner's sentence. Because the jury found petitioner responsible for "5 or more grams" of cocaine base, expressly rejecting a finding of "50 or more grams," Pet. App. 3a; Pet. 2; BIO 2, petitioner's case was controlled by subparagraph (B), which governs quantities of between 5 and 50 grams of cocaine base. However, the district judge rejected the jury's findings and deemed petitioner responsible

for 309.2 grams, subjecting him to subparagraph (A), which governs cases involving quantities of 50 or more grams of cocaine base. Subparagraph (A) required the judge to impose a mandatory minimum term of twenty years because that minimum term exceeded the Guideline range. U.S.S.G. 5G1.1(b) (2003).

If petitioner's sentence had been subject to subparagraph (B), pursuant to the jury's verdict, rather than subparagraph (A), his sentence would have been controlled by the Sentencing Guidelines and would have been less than twenty years. The judge would have sentenced petitioner to a Guideline range which corresponded to his finding that petitioner was responsible for 309.2 grams of drugs. Critically, however, subparagraph (A)'s twenty-year mandatory minimum would *not* have been applied because the jury's verdict would have placed the case squarely within subparagraph (B). Pet. App. 3a, 13a; Pet. 2; BIO 3. Specifically, if the judge's finding of quantity had properly been treated as a sentencing enhancement under the Guidelines, rather than an override of the jury's determination of the substantive offense, petitioner's Guideline range would have been only 168-210 months. Presentence Report ¶¶ 23, 47; BIO 3.

The D.C. Circuit would have reversed petitioner's sentence. In *Graham*, the jury was not asked to make any finding with respect to the quantity of drugs attributable to the defendant. The case was therefore controlled by subparagraph (C), which governs indeterminate amounts of cocaine base and amounts less than 5 grams. But the district judge proceeded to find the defendant responsible for 62 grams of cocaine base and, on that basis, "sentenced" the defendant under subparagraph (A), which mandates a minimum five-year term of supervised release. 317 F.3d at 266, 272. Under subparagraph (C), by contrast, the minimum term of supervised release required by the jury verdict was three years. *Id.* at 273, 275.

The D.C. Circuit reversed. The court of appeals first found no constitutional violation under *Apprendi*, since neither the defendant's 210-month prison sentence nor his five-year term of supervised release exceeded the penalties authorized by subparagraph (C). 317 F.3d at 273-75.

Having found no *Apprendi* error, however, the D.C. Circuit proceeded to hold that the district court's decision to sentence the defendant under subparagraph (A) was *forbidden by the statute*. The *Graham* court explained that, because settled D.C. Circuit precedent holds that drug quantity is an "element of the offense" that must be found by the jury, the statute does not permit the district judge to impose a sentence that rests on his or her own findings of quantity. 317 F.3d at 274. "Consequently, in light of [D.C. Circuit precedent], the district court, in sentencing Graham, could not treat subparagraphs (A) and (C) of § 841 as mere sentencing factors, and to the extent it did it erred." *Id.* at 275.

The D.C. Circuit furthermore held that the error required reversal. The five-year term, though permissible under both subparagraph (A) and subparagraph (C), was two years higher than the minimum term required under (C). See 21 U.S.C. 841(b)(1)(C). Recognizing that "the district court in sentencing Graham appears to have tracked the mandatory minimum sentencing provisions of § 841, and thus may have applied § 841(b)(1)(A), which increased Graham's supervised release period by two years," the court of appeals remanded for resentencing. 317 F.3d at 275.

In petitioner's case, the district judge erred under D.C. Circuit law by sentencing petitioner under subparagraph (A) rather than subparagraph (B). Such an error furthermore requires reversal. The twenty-year mandatory minimum term that the judge in this case deemed himself required to impose under subparagraph (A) based on his findings of drug quantity greatly exceeds the sentence to which petitioner was subject under the Guidelines based on the jury's verdict that the case was controlled by subparagraph (B).

2. There is no merit to the three arguments advanced by the government in passing to suggest that there is no conflict.

First, the government asserts without elaboration that "*Graham* did not present a pure question of statutory construction." BIO 15. To be frank, we have no idea what the government is talking about. It is certainly true that the D.C. Circuit in *Graham* considered a constitutional challenge under *Apprendi*. The relevant point, however, is that (as the Solicitor General acknowledged in his *Santana* brief) the D.C. Circuit *rejected* that constitutional challenge. See *supra* at 2, 4; 317 F.3d at 274. (Petitioner made the same constitutional argument, and lost on the same ground, in this case. See Pet. App. 14a-15a.). The D.C. Circuit, having found no constitutional violation, proceeded to rule for the defendant as a "pure [matter] of statutory construction." Contra BIO 15.

Second, the government asserts that "neither *Graham* nor the cases it relied on addressed Congress's intent in enacting the statute or otherwise applied tools of statutory construction to determine whether Section 841(b) creates offense elements." BIO 16. This is not an argument about the D.C. Circuit's holding so much as it is literary criticism. The fact that the government disagrees with the D.C. Circuit's *reasoning* does nothing to undercut the reality of that Court's *holding*. What matters for purposes of the certiorari determination is the D.C. Circuit's clear holding in a uniform line of precedents that Section 841(b)(1) defines offense elements. That holding is irreconcilable with the First Circuit's decision in this case.[2]

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[2] The government provides a "Cf." citation to a pre-*Apprendi* decision of the D.C. Circuit holding that Section 841(b)(1) sets forth sentencing factors, *United States* v. *Williams*, 194 F.3d 100 (CADC 1999), *cert. denied*, 531 U.S. 1178 (2001). See BIO 16. But the government correctly does not assert that *Williams* has precedential value any longer in the D.C. Circuit. See, *e.g.*, *United States* v. *Webb*, 255 F.3d 890, 894 (CADC 2001) (noting that *Williams* stated D.C. Circuit law "[u]ntil 2000").

The government's argument is also bad literary criticism, for the D.C. Circuit's holding is – as the petition and *amicus* brief explain at length – correct. Particularly relevant here, *no* circuit deems subparagraphs (A) to (C) to establish sentencing factors in all instances. Rather, other circuits hold that Section 841(b)(1) establishes sentencing factors when the judge's finding would cause the sentence to exceed the otherwise applicable statutory maximum. The contention that subparagraphs (A) to (C) "sometimes" set forth sentencing factors is illogical as a matter of statutory construction.

Third, the government asserts, "Although the D.C. Circuit has referred to drug quantity after *Apprendi* as an 'element,' that characterization is properly understood to mean not that Congress intended it to be an element, but that the Constitution requires that it be treated as if it were an element when an enhanced sentence is sought." BIO 17. This appears to be nothing more than a reprise of the government's erroneous claim that *Graham* turned on the need to avoid a violation of *Apprendi*. See *supra* at 5. If the government instead means that *Graham* applies when the government seeks an "enhanced sentence" that would not have been imposed under the jury's verdict, that is precisely our point. The government sought such an "enhanced sentence" in both *Graham* and this case. The D.C. Circuit invalidated the resulting sentence; the First Circuit sustained it.[3]

Because the decision below stands in square conflict with the holding of the D.C. Circuit, certiorari should be granted.

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[3] The government notes that the pre-*Graham* D.C. Circuit decisions "are consistent with" a holding that Section 841(b)(1) requires drug quantity to be an element only if the defendant's sentence would exceed the otherwise applicable statutory maximum. BIO 17. The relevant point, however, is that *Graham* is not remotely "consistent with" that reading.

II. The Question Presented Recurs Frequently.

The government professes that it is "unclear" whether the question presented has recurring significance. BIO 19. Preliminarily, we note that the government does not dispute that the question has enormous significance for many defendants previously convicted under Section 841 in cases in which, over the defendant's properly preserved objection, drug quantity was not presented to the jury.

But certiorari should be granted even if *only* prospective significance matters. Section 841 is, by far, the most frequently charged provision of the U.S. criminal code. Tens of thousands of defendants are convicted under the scheme set out in Section 841(b) *every year*. See Pet. 12. It would be stunning if the bedrock question whether so central a criminal statute sets forth elements of the offense or instead sentencing factors were less than surpassingly important.

1. The government's contrary argument rests on a false syllogism. It begins with the premise that, "in cases in which the government intends to seek an increase in the otherwise applicable statutory maximum sentence, federal prosecutors routinely assure that the threshold drug quantity needed for an enhanced sentence is charged in the indictment and submitted to the jury for determination beyond a reasonable doubt." BIO 19. The government has invoked that premise, which suggests that *Apprendi* violations are unlikely to recur in the future in federal cases, to oppose certiorari petitions presenting questions regarding whether various sentences were consistent with *Apprendi*.

But the Solicitor General would have this Court leap from this premise to the *false* conclusion that "the question whether Congress itself intended for drug quantity to be an offense element is ordinarily of little, if any, prospective importance in cases like this one, because drug quantity is being treated as if Congress *had* intended it to be an element." BIO 19 (emphasis in original). That assertion ignores the vast number of cases in which the government does not charge

quantity to the jury because the sentence it seeks is not above the subparagraph (C) maximum and therefore does not implicate *Apprendi*.

Depending on the circumstances, in a crack cocaine case, the subparagraph (C) maximum is (i) twenty years (in a basic case), (ii) thirty years (if the defendant has a prior felony conviction), or (iii) life imprisonment (in cases of death and serious bodily injury). When the government does not seek a sentence higher than this maximum under subparagraph (C) – as it does not in many cases because the Guidelines will often not permit a sentence beyond the minimum – *Apprendi* is not implicated and the government need not charge drug quantity.

Furthermore, quantity is "a[n] often hotly contested issue which must frequently be proved based on circumstantial evidence" (*United States* v. *Rigsby*, 943 F.2d 631, 643 (CA6 1991)), and which has a profound effect on the length of the sentence. For its part, the government consistently charges individual defendants with the full quantity that arguably could be attributed to them based on the acts of associates whom the government deems co-conspirators. By contrast, defendants often seek to have the question of quantity presented to the jury, which is less likely to hold defendants responsible for the attenuated acts of other individuals.

Because most cases do not involve sentences exceeding the maximum set by subparagraph (C), the government's argument "*does not apply to the vast majority of sentencing scenarios*." *United States* v. *Sanchez*, 269 F.3d 1250, 1268 (CA11 2001) (emphasis added). Indeed, from the fact that the average sentence imposed in federal drug cases is 72.7 months (see *www.ussc.gov/judpack/2001/1c01.pdf*) and 115 months in crack cocaine cases (see *www.ussc.gov/annrpt/2001/fig-j.pdf*) – *i.e.*, well below the subparagraph (C) maximum – it is fair to conclude that the government need only charge drug quantity in a *minority* of cases.

2. Just as important, the failure to secure, and abide by, a jury finding on quantity often changes the ultimate sentence.

The judge's findings can produce dramatic differences in mandatory minimum sentences.

Assume, *just as in this case*, that a defendant with a prior qualifying conviction is responsible for either 309 grams (according to the government) or more than 5 but less than 50 grams (according to the defendant) of crack cocaine. The government generally will not charge quantity to the jury in such a case because even a judicial determination that a defendant was responsible for 300 grams would require the application of the 20-year minimum from subparagraph (A), which does not exceed the maximum sentence under subparagraph (C).[4] That is so because the applicable Sentencing Guidelines range would be lower than 20 years (see U.S.S.G. 2D1.1(c)(3), 5A (criminal history category II; offense level 34)), and statutory minimum sentences override lower Guideline ranges (see *id.* § 5G1.1(b)).

But the 20-year sentence resulting from the judge's 300-gram finding is much longer than the sentence that would result if drug quantity were treated as an element and (as in this case) the jury deemed the defendant responsible for less than 50 grams. Then, the 20-year mandatory minimum of subparagraph (A) would not apply, because the jury did not find the defendant guilty of the offense defined in that subparagraph. The sentence would instead be calculated under the Guidelines, and would be substantially lower than twenty years. See *id.* §§ 2D1.1(c)(5)-(7) (offense level 26-30). Even if the judge enhanced the Guideline range based upon his determination that the defendant possessed 309 grams, the defendant would still only be subject to imprisonment for 168-210 months. See *id.* §§ 2D1.1(c)(3), 5A (criminal history category II; offense level 34).[5]

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[4] Quantity was put before the jury in this case only because the First Circuit had not, at that time, decided the question presented.

[5] The question presented has the same prospective importance with respect to plea bargains, which resolve more than 96% of drug cases. See *www.ussc.gov/judpack/2001/1c01.pdf* (tbl 3). When the

To be sure, there is not a large body of appellate case law presenting this scenario. But the explanation is simple: in every circuit except the D.C. Circuit, quantity is generally not put before the jury, so that the judge never has cause to override the jury's determination. In the D.C. Circuit itself, *Graham* prohibits the judge from overriding the jury. Thus, the conflict is sufficiently fixed that there is *no* circuit in which cases would regularly emerge in which, as here, the judge overrode the jury's findings. But that does not in any respect undercut the importance of the question presented, for in *many* cases, if quantity *were* put before the jury, the verdicts would regularly preclude the imposition of mandatory minimum sentences under subparagraphs (A) and (B). See *supra* at 8.

3. The government also identifies a further category of cases in which the question presented will arise in the future: those in which the defendant pleads guilty but contests drug quantity. BIO 19-20 n.7. The fact that few appellate cases have been decided in that circumstance does not mean that they have not arisen in the district courts, as such cases are most often resolved without appeals, and manifestly does not mean that they will not arise in the future. To defer review now, when it is clear that the question will continue to arise, would invite an ever-increasing number of retroactivity claims that will serve only to burden the federal courts. See Pet. 13-14. Principles of sound judicial administration thus counsel in favor of granting certiorari now.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

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quantity alleged by the government will not produce a sentence in excess of the subparagraph (C) maximum, the judge's finding of quantity after accepting the plea will frequently trigger a mandatory minimum under subparagraphs (A) or (B).

Respectfully submitted,

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